87-377

Supreme Court, U.S.
FILED
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ELISE D. MCINTOSH, SUSAN C. SORRELLS, ODESSA HOLLIS, ANN E. KENNEDY, and JOANN SCHERBRING,

Cross-Petitioners,

VS.

CASPAR W. WEINBERGER, Secretary of Defense, JOHN O. MARSH, JR., Secretary of the Army, and EDWARD O. TURNER,

Cross-Respondents.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

Where in an employment discrimination case, an agency offers as its legitimate non-discriminatory reason for its actions that the selectees for promotion were better qualified, but in a prior jury trial on a related *Bivens* claim the jury found that the plaintiffs, and not the selectees, were better qualified, is the district court collaterally estopped by the jury's verdict under the doctrine of *Beacon Theatres v. Westover,* 359 U.S. 500 (1959), or may the court reassess the evidence on the question of qualifications?

PARTIES TO THE PROCEEDINGS

Petitioners Elise McIntosh, Susan C. Sorrells, Odessa Hollis, Ann E. Kennedy, and JoAnn Scherbring were plaintiffs in the District Court and appellants and appellees in the Court of Appeals for the Eighth Circuit.

Respondents Caspar W. Weinberger and John O. Marsh were defendants in their official capacities in the District Court and appellees in the Court of Appeals. Respondent Edward O. Turner was a defendant in the District Court and appellant in the Court of Appeals for the Eighth Circuit and is a nominal respondent in this Court.

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CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Cross-petitioners, McIntosh, Sorrells, Hollis, Kennedy, and Scherbring respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on January 14, 1987.

OPINIONS AND JUDGMENT BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit (App. 1a-45a) and its judgment (App. 72a) were entered on January 14, 1987.[1] The opinion is reported at 810

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[1] "App." refers to the Appendix to the petition for writ of certiorari filed by Edward Turner; "C. App." refers to the Appendix to this cross-petition; "Tr." refers to the transcript of the jury trial.

F.2d 1411 (1987). The opinion of the United States District Court for the Eastern District of Missouri of July 12, 1985 (App. 58a-68a) is unreported.

JURISDICTION

The Opinion and Judgment of the Court of Appeals For The Eighth Circuit was entered on January 14, 1987. The Respondent Edward O. Turner filed a Petition For Rehearing which was denied by Order of April 9, 1987. By order of July 1, 1987 Justice Blackmun extended the time to Edward O. Turner to file a petition for a writ of certiorari until July 29, 1987.

The petition for a writ of certiorari (No. 87-174) was received by these cross-petitioners on August 3, 1987.

Jurisdiction for this cross-petition for a writ of certiorari is based upon Rule 19.5, Rules of the Supreme Court. This cross-petition is conditional upon this Court granting Edward Turner's petition for a writ of certiorari.

CONSTITUTIONAL PROVISION INVOLVED

The Seventh Amendment to the United States Constitution is set forth in the Appendix to this cross-petition. (C App. A)

STATEMENT OF THE CASE

Edward O. Turner, Cross-Respondent, has filed a petition for a writ of certiorari with this Court (No. 87-174) relating to a judgment against him for damages on a *Bivens* claim arising in the federal employment context, which was asserted in Count IV of plaintiffs' complaint. The cross-petition here relates to race and national origin discrimination claims made in Count I of the Complaint, which were ruled adversely to the plaintiffs, Elise McIntosh (American Indian), Susan Sorrells (Hispanic), and Odessa Hollis (Black). Cross-Petitioners Ann Kennedy and Joanne Scherbring were plaintiffs in the original action, but

their claims of age discrimination were dismissed without prejudice by the district court based upon failure to exhaust their administrative remedies. They proceeded administratively with their claims and their claims are now ripe for adjudication by the District Court. The question presented here will be material on the trial of their age discrimination cases.

The issue here involves the jury's findings in the case against Edward Turner on the *Bivens* count and its impact on the Title VII count.

The five plaintiffs, cross-petitioners here, were federal employees who applied for certain promotional opportunities under two job announcements. All five plaintiffs applied for a Management Analyst position, in which five selections were made. Two plaintiffs applied for a second position. After their non-selection, the plaintiffs made complaints to their Congressmen which resulted in inquiries being made into personnel practices of the agency by higher headquarters, and to a reconstruction of the first promotion action. Plaintiffs also made the EEO complaints referred to above, based upon race, national origin, and age discrimination.

The destruction of the results of the reconstruction of the first promotion action under the orders of Edward Turner led to the claim against Turner and ultimately to the jury verdict against him.

The jury in the Turner case was given an instruction calling upon it, in part, to find whether the panel rating and ranking the candidates for Management Analyst selected the best qualified people for the positions (C App. B) and to find for the plaintiffs if they suffered injury. The jury was further instructed to compensate plaintiffs for any damages they sustained as a result of the occurrence mentioned in the evidence. Each plaintiff presented evidence of the money they lost and other injuries they suffered by reason of the failure to obtain promotion to Management Analyst. (Tr. 3-28, 107, 136, 156) The jury

returned a verdict for damages for each plaintiff, awarding a total of $50,000.00 in actual damages plus $60,000.00 punitive damages. The jury trial consumed five days of testimony reported in five volumes of transcript.

Thereafter, the matters on the race and national origin discrimination claims of three of the plaintiffs, McIntosh, Sorrells and Hollis were tried to the court. The trial on the non-jury Title VII claims consumed seven days of trial reported in nine volumes of transcripts. The trial for the most part consisted of evidence on the qualifications of the original selectees for the positions and the qualifications of the plaintiffs who claimed to be better qualified than the selectees. In ruling on the question of discrimination the district court also considered the testimony taken in the earlier jury trial and in a hearing on class certification.

The District Judge in his Memorandum Opinion entering judgment for the defendants on the discrimination claims stated:

> Although the jury found for plaintiffs on Count IV, the Court does not feel compelled to concur with the jury findings in reaching the Court's decision on Counts I and II. See Lartius v. Iowa Dept. of Transportation, 705 F.2d 1018 (8th C. 1983). Count IV was a deprivation of property without due process claim against defendant Captain Edward Turner. Some underlying facts are the same in the three counts, but generally the factual and legal issues differed between the record destruction claim and the Title VII and retaliation claims.

The district court held that plaintiffs had established a prima facie case of race and national origin discrimination, but then held that the defendants articulated legitimate non-discriminatory reasons for the plaintiffs' non-selection, in that the persons chosen were more qualified for the positions than plaintiffs. The District Judge then examined the testimony of qualifications to back up his conclusions.

On appeal, the Eighth Circuit approved the decision of the trial court, although it noted that the factual issues which are essential to both a jury claim and a non-jury claim must be tried first to the jury, so that the litigants' Seventh Amendment jury-trial rights are not foreclosed on the common factual issues. The appeals court also noted that a jury finding in a 42 U.S.C. §1981 claim on the core issue of discrimination would preclude by collateral estoppel a contrary result on the Title VII claim. However, holding that the issue before the District Judge in the bench trial was close to that tried to the jury but was not identical, the Eighth Circuit refused to apply collateral estoppel.

REASONS FOR GRANTING THE WRIT

The Decision Of The Appeals Court Is In Conflict With Prior Decisions Of This Court Regarding The Right To Trial By Jury On Damage Claims And The Binding Effect Of A Jury's Determination Of Facts.

This case represents a departure from a long series of decisions by this Court. This Court stated more than 80 years ago that the principle of estoppel by judgment has insured "the very object for which civil courts have been established which is the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for the aid of judicial tribunals would not be invoked for the vindication of rights of person and property if ... conclusiveness did not attend the judgment of such tribunals." In this context this Court has emphasized the conclusiveness of the judgment of judicial tribunals both as to a final judgment entered on the merits of the case, and as to issues actually litigated in a prior lawsuit. *Nevada v. United States,* 463 U.S. 110, 129, 130 n.11 (1983); *Parklane Hosiery Co. v. Shore,* 439 U.S. 322 (1979). The jury trial here was properly held prior to the trial on the non-jury counts. *Beacon Theatres, Inc. v. Westover,* 359 U.S. 500 (1959).

The jury was instructed in part to find for the plaintiffs if the plaintiffs proved that the panel chosen by Mr. Turner to reconstruct the promotion action selected the best qualified people for the positions. The evidence at the jury trial and the verdict of the jury supported that the individuals who were selected for the positions had been determined by the reconstruction panel to be not minimally qualified, while the plaintiffs were found to be best qualified.

The district judge stated that he did not feel compelled to concur with the jury findings in reaching his decision. He stated that the underlying facts were the same, but held that the factual and legal issues differed, with which the appeals court concur-

red. Essentially the district judge and the court of appeals were dealing with the concept of res judicata and not collateral estoppel as to the ultimate issue of discrimination. However, the jury had made a decision on an issue of fact which was conclusive on the Title VII claims, that the plaintiffs were best qualified and the selectees were not qualified for the positions.

The inquiry that the district court performed, an analysis of why the selectees were better qualified, was superfluous and contrary to established law, as the jury verdict rebutted the agency's proffered legitimate non-discriminatory reason for the selections. Under *United States Postal Service Board of Governors v. Aikens,* 460 U.S. 711 (1983), Title VII plaintiffs can carry their burden of proof by proving that the reason offered for the decision made is not worthy of belief.

Based upon the prima facie case made by the plaintiffs and the jury finding, the district judge should have found that the defendants violated Title VII in failing to promote the petitioners McIntosh and Sorrells based on national origin discrimination and in failing to promote the petitioner Hollis based on race discrimination. Cross-petitioners Kennedy and Scherbring will have this same issue on remand from the court of appeals, as their age discrimination claims are now awaiting trial before the same district judge.

The chaos created by the failure to accept the jury's findings on the Title VII claims points out the merit of review by this Court. Title VII actions should not be burdened by the rigidly mechanized or ritualistic prima facie case method established in *McDonnell Douglas v. Green,* 411 U.S. 792 (1973), as was pointed out in *Aikens. Aikens* makes it clear that the *McDonnell Douglas* analysis is merely a sensible, orderly way to evaluate the evidence as it bears on the critical question of discrimination. Here, plaintiffs carried their burden of proof on the ultimate issue of discrimination by the jury finding showing that the defendants' explanation was untrue and unworthy

of belief. The lower courts here have failed to apply *McDonnell Douglas* flexibly, and have instead viewed the elements of proof in a rigid manner that this court has forbidden. The Court should accept this case for further clarification of the *McDonnell Douglas* standards, with a direction to the courts to reach the issue of discrimination as quickly as possible, and not to abandon established, long standing legal doctrines such as collateral estoppel in reaching their determinations.

The importance of this case also derives from the prominence of employment discrimination actions and the need for even-handedness in the application of collateral estoppel in such cases. There are many cases filed today which bear multiple counts. Some are to be decided by juries and others to be decided by the court. A judge who may be dissatisfied with a jury verdict may, instead of setting aside the verdict, state, as he did here, that he does not feel compelled to concur with the jury's findings, and may render a decision which is based upon findings of fact that are in conflict with the jury's findings.

This Court has indicated that it will vigilantly defend the right to a jury determination of questions of fact, and that decisions in derogation of that right must be scrutinized with the utmost care, and that special and important reasons for the grant of certiorari are present when lower courts deprive litigants of their right to a jury determination. *Beacon Theatres, Inc. v. Westover,* 359 U.S. 500, 501 (1959); *Rogers v. Missouri Pacific Railroad,* 352 U.S. 500, 509-510 (1957).

While jury findings adverse to plaintiffs in actions under 42 U.S.C. §1981 cases are held to be binding on Title VII claims raised in the same case, *Lartius v. Iowa Department of Transportation,* 705 F.2d 1018 (8th Cir. 1983, the courts are applying a variety of rationales to avoid giving collateral estop-

pel effect to prior jury findings favoring plaintiffs.[2] *See, Davis v. West Community Hospital,* 786 F.2d 677, 682 (5th Cir. 1986), declining to give collateral estoppel effect on a Title VII claim to a jury verdict for the plaintiff in an action brought under 42 U.S.C. §1981, for the reason that although the jury found that plaintiff was discriminated against on the basis of his race in termination of his staff privileges, the defendants in the Title VII action were members of the hospital's board of directors, and only one member of the board of directors was a defendant in the §1981 count and was found to have discriminated against the plaintiff. *See also, Ritter v. Mount St. Mary's College,* 814 F.2d 986 (4th Cir. 1987), in which the court held that where Equal Pay Act and an Age Discrimination in Employment Act claims were brought along with a Title VII claim but were erroneously dismissed prior to trial, a prior determination of questions of fact adverse to plaintiff by the district court on the Title VII claim would bar relitigation and a jury trial on the Equal Pay Act and ADEA claims. *But, cf. Hussein v. Oshkosh Motor Truck Company,* 816 F.2d 348 (7th Cir. 1987) (where district court committed legal error in dismissing claim under 42 U.S.C. §1981, adverse determination on Title VII claim based upon same facts would not bar relitigation and jury trial of §1981 claim).

With the current volume of business in the Courts and the necessity to conserve the time devoted to litigation, this Court should stress the necessity of finality as to issues already adjudicated. It took five days to try the Turner case, and Turner was well represented by the same government attorneys who

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[2] The rights of civil rights plaintiffs to determination of their claims in a federal forum have been limited by the decisions giving collateral estoppel effect in federal court to determinations made in other forums such as state courts and administrative tribunals in *Kremer v. Chemical Construction Corporation,* 456 U.S. 461 (1982), *University of Tennessee v. Elliott,* 478 U.S. ____, 92 L.Ed.2d 635 (1986), *Allen v. McCurry,* 449 U.S. 90 (1980).

also represented the agency in the Title VII counts. The Title VII cases took seven days to try with approximately all seven days consumed in testimony as to who was better qualified, an issue already long decided. This Court's opinion in *United States Postal Service Board of Governors v. Aikens, supra,* indicates that the issue of discrimination should have been decided before a week's time of the Court had been consumed on relitigation of facts.

This Court should grant the petition here to demonstrate that what has been the law for over 80 years on collateral estoppel should be applied without hesitation for plaintiffs who have previously prevailed on a conclusive issue of fact.

CONCLUSION

The Cross-Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

AMENDMENT [VII.]

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

APPENDIX B

Your verdict must be for each of the five Plaintiffs, Elise McIntosh, Odessa Hollis, Susan Sorrells, Ann Kennedy, and JoAnn Scherbring if you find

FIRST, That Defendant Edward Turner was ordered to reconstruct the action of rating the candidates relating to Management Analyst positions in job announcement 81-17 and 81-24, under authority of the Commander of ALMSA and pursuant to the order issued for reconstruction made by the Commander of DARCOM, U.S. Army in Alexandria, Virginia; and

SECOND, That pursuant to the Defendant Edward Turner's authority, two individuals were designated as Personnel Staffing Specialists to rate the candidates eligible for the position of job opportunity announcement 81-17 and job opportunity announcement 81-24;

THIRD, That pursuant to Defendant Edward Turner's authority thereafter and ad hoc panel of experts met to rate and rank the candidates found eligible for the two positions. And

FOURTH, That thereafter the panel did in fact select the best qualified people for the positions, job opportunity announcements 81-17 and job opportunity announcement 81-24.

FIFTH, That thereafter this panel submitted their results to the Defendant, Edward Turner, and

SIXTH, That the Defendant Edward Turner had the results of the Personnel Staffing Specialists and the ad hoc panel destroyed.

SEVENTH, That you find the Defendant Edward Turner's action was contrary to the directive issued by the Commander of DARCOM and was willfully done by Defendant Edward Turner.

EIGHTH, That said act of Defendant Edward Turner violated each of the Plaintiffs' Constitutional Rights to due process of law, and

NINTH, As a direct result of the conduct of Edward Turner, each of the Plaintiffs suffered injury.

* * * * *

If you find in favor of the Plaintiffs, then you must award Plaintiffs such sums as you believe will fairly and justly compensate Plaintiffs for any damage you believe they sustained as a direct result of the occurrence mentioned in the evidence. If you find that the Plaintiffs are entitled to a verdict in accordance with these instructions, but do not find that Plaintiffs have sustained actual damages, then you may return a verdict for the Plaintiffs in some nominal sum, such as one dollar.

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ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

Cross-petitioners [hereinafter petitioners] are three civilian employees of the Department of the Army who alleged, inter alia, that they were denied certain promotions in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16.[1] The same complaint included a *Bivens* action against an agency official assigned to investigate their claims of discrimination, alleging that he violated their due process rights by destroying materials generated as part of his investigation. This latter claim went to trial first before a jury and, following a judgment

[1] The legitimate cross-petitioners in this case are Elise McIntosh, Susan Sorrells, and Odessa Hollis, all of whom pursued and lost a Title VII claim against the federal cross-respondents [hereinafter respondents] in the district court. Two other persons, Ann Kennedy and Joanne Scherbring, who did not bring any Title VII action, are improperly listed as cross-petitioners. Their age discrimination claims, which were properly dismissed without prejudice by the district court pending exhaustion of administrative remedies, were subsequently rejected at the administrative level and are currently pending, once again, before the district court.

for the plaintiffs, the Title VII claims were tried to the court, resulting in judgment for the Army. The court of appeals affirmed both aspects of the judgment.

The present cross-petition is filed in response to a petition for certiorari filed by the agency official, Edward Turner, seeking review of the *Bivens* judgment against him. The cross-petition contends that the judgment against Turner collaterally estopped the district court in the Title VII suit from finding no discrimination in the underlying personnel actions. The decision below is correct and does not conflict with any decision of this Court or any other court of appeals. The cross-petition should, therefore, be denied.

1. Petitioners applied but were not selected for certain promotions in early 1981 (Pet. App. 7a-8a).[2] They filed informal discrimination complaints and contacted their Congressmen, claiming that the selection process was unfairly conducted (*id.* at 8a-9a). Edward Turner, an assistant civilian personnel officer, was asked by Army headquarters to review the promotion decisions in response to congressional inquiries made on behalf of petitioners (*id.* at 9a). His report, which concluded that the original determinations were "defensible," formed a basis for the response to the congressional inquiries (*id.* at 11a). In the meantime, petitioners' informal discrimination complaints were resolved against them administratively, and they filed formal complaints with the United States Army Civilian Appellate Review Agency (*id.* at 9a).

Petitioners subsequently filed this suit, which included the present Title VII allegations and the *Bivens* claim against Turner. Following the jury trial of the claim against Turner, which culminated in a general verdict in

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[2] Citations to "Pet. App." are to the appendix to the petition for a writ of certiorari in *Turner* v. *McIntosh*, No. 87-174.

favor of petitioners,[3] the court conducted a bench trial on the discrimination claims and found for respondents. The court found that petitioners had established a prima facie case of discrimination, but that respondents had articulated a legitimate non-discriminatory reason for their nonselection—*i.e.*, that the persons ultimately selected were considered more qualified (Pet. App. 63a). The court concluded that petitioners had failed to meet their burden of showing either that the proffered reason was unworthy of credence or that the employment decisions more likely than not were motivated by discrimination (*id.* at 64a-66a).

Petitioners argued on appeal, inter alia, that in the earlier trial on the *Bivens* claim, the jury necessarily found that petitioners were "best qualified" for the positions in question and that collateral estoppel precluded a contrary finding on that issue by the district court in the discrimination suit. The court of appeals rejected that argument noting, first, that the jury gave only a "general verdict" in favor of petitioners so that it was impossible to be certain "what specific facts the jury found." Pet. App. 29a. The court of appeals held further that even assuming the jury verdict meant that petitioners were best qualified for the jobs in question, the Title VII action raised the different question "whether the promoting officials (acting long before the reconstruction overseen by Turner) believed (whatever the actual fact) that the persons promoted were better qualified than [petitioners]" (*ibid.*). Since the two issues were not identical, the jury's verdict on the constitutional tort claim did not control the discrimination claim tried to the district court (*ibid.*).

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[3] The jury awarded damages against Turner in his individual capacity totalling $110,005, and the district court entered judgment for the five plaintiffs (see n.1, *supra*) in that amount, plus interest and costs. The court of appeals affirmed. Turner has filed a petition for a writ of certiorari on the *Bivens* claim. See *Turner* v. *McIntosh*, petition for cert. pending, No. 87-174.

2. Petitioners' collateral estoppel argument is meritless for two reasons. First, the Department of the Army was not a party to the first suit and, thus, cannot be estopped in the second suit. Petitioners' *Bivens* action was brought against Turner in his individual capacity. Petitioners' Title VII claim is against the Department of the Army, with respondents Weinberger and Marsh named only in their official capacities. See generally *Stafford* v. *Briggs*, 444 U.S. 527 (1980) (distinguishing suits against federal employees in their individual capacities from suits nominally or in essence against the United States). While collateral estoppel has been found applicable among private litigants in the absence of strict mutuality, at least the party against whom nonmutual collateral estoppel is invoked must have been a party to the prior suit.[4] Petitioners simply "[fail[] to recognize the obvious difference * * * between a party who has never litigated an issue and one who has fully litigated and lost * * *." *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 327 (1979). The Department of the Army cannot be deprived of at least one "full and fair opportunity" to present its case. *Standefer* v. *United States*, 447 U.S. 10, 24 (1980); *Parklane Hosiery Co.* v. *Shore*, 439 U.S. at 328; *Blonder-Tongue Labs.* v. *University Found.*, 402 U.S. 313, 328 (1971). Petitioners state (Cross-Pet. 9-10) that "Turner was * * * represented by the same government attorneys who also represented the agency in the Title VII counts." However, collateral estoppel applies against parties, not attorneys.

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[4] Offensive use of collateral estoppel permits a new plaintiff to invoke the doctrine against a defendant who has already litigated the same issue in a prior case. See *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322 (1979). Defensive use of collateral estoppel permits a new defendant to invoke the doctrine against a plaintiff who has already litigated the same issue in a prior case. See *Blonder-Tongue Labs.* v. *University Found.*, 402 U.S. 313 (1971). Nonmutual collateral estoppel does not, however, apply against the United States. *United States* v. *Mendoza*, 464 U.S. 154, 158 (1984).

Second, the court of appeals correctly concluded that the issues in the two proceedings were not identical. Without such identity of issues there can be no estoppel. See, *e.g.*, *Nevada* v. *United States*, 463 U.S. 110, 130 n.11 (1983); *Commissioner* v. *Sunnen*, 333 U.S. 591, 597-598 (1948). The jury in the *Bivens* action issued only a general verdict for petitioners, finding that Turner violated petitioners' constitutional rights during his investigation, an investigation which necessarily took place after the hiring decisions at issue in the Title VII suit. The jury was never asked to decide, and logically need never have considered, the question which the district court and the court of appeals found dispositive in the Title VII action (Pet. App. 29a), which is whether the selecting officials believed that the persons actually promoted were better qualified for the positions than petitioners.[5] Its verdict, therefore, cannot be dispositive on that point.

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[5] Only by incautious inference can it even be said that the jury "must have concluded" that the evidence destroyed by Turner indicated that petitioners were in fact the best qualified for the positions in question. The district court instructed the jury on the *Bivens* claims that in order to find for petitioners it must find, inter alia, that a second panel convened to review the original personnel decisions (a panel whose results Turner was alleged to have improperly suppressed and destroyed) "did in fact select the best qualified people for the positions" in question (Cross-Pet. App. A2). It is not at all clear what this means, since there is no corresponding instruction requiring the jury to find that the second panel concluded that petitioners were those "best qualified people." In any event, "best qualified" is a term of art in federal personnel matters denoting those applicants who, after a second screening, are referred to the selecting official (see Pet. App. 6a-7a, 64a). As happened here, a panel frequently refers many more "best qualified" candidates to the selecting official than there are positions to fill. It is not up to the rating panel to determine whether any particular "best qualified" applicant is better suited for the position than any other "best qualified" applicant. That is left entirely to the selecting official. Thus, even if the jury's general verdict could be construed as a specific finding that plaintiffs were "best qualified," it cannot be construed as a finding that the panel determined that plaintiffs were entitled to the jobs.

It is therefore respectfully submitted that the cross-petition for a writ of certiorari should be denied.[6]

CHARLES FRIED
Solicitor General

OCTOBER 1987

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[6] Turner's petition in No. 87-174, on the other hand, does present a substantial question and should be disposed of in light of *Kotarski* v. *Cooper*, petition for cert. pending, No. 86-1813 (filed May 13, 1987), a case which presents substantially the same issue. It is not necessary to hold this cross-petition until the resolution of No. 87-174, however, since this cross-petition presents no issue that either warrants the Court's review or would be affected by the disposition of No. 87-174.

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ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

CROSS-PETIONERS' REPLY MEMORANDUM

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-377

ELISE D. MCINTOSH, ET AL., CROSS-PETITIONERS

v.

CASPAR W. WEINBERGER, SECRETARY OF DEFENSE, ET AL.

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In brief reply, petitioners reject the argument that *Kotarski v. Cooper*, 799 F.2d 1342 (9th Cir. 1986), *petition for cert. pending*, No. 86-1813, presents substantially the same issue as that in *Turner v. McIntosh, petition for cert. pending*, No. 87-174. In *Kotarski*, the rights of a probationary employee are involved, while in *Turner v. McIntosh*, the rights of career service employees with vested interests are asserted.

Secondly, it is important that the cross-petition here be accepted if certiorari is granted in *Turner v. McIntosh*, since the

petitioner in *Turner* is claiming that petitioners here had a Title VII remedy as an administrative remedy. If the Court accepts that view, but has rejected certiorari here, then petitioners will have lost all relief, although a jury found that petitioners suffered such intentional and wrongful acts at the hands of a government employee as to warrant punitive damages. Denial of certiorari here would accomplish that which the government wants, to foreclose the alternative of Title VII relief and to then hope that this Court will find that a *Bivens* action is unavailable.

Finally, respondents have raised the technical argument that Weinberger and Marsh, the nominal defendants in the Title VII case pursuant to 42 U.S.C. §2000e-16(c), were not defendants in *Turner v. McIntosh*, and that collateral estoppel is therefore inapplicable. This is a new claim that was never raised below, and it has therefore been waived. Moreover, a review of the record would show that the agency's and Turner's conduct in connection with these promotion actions was part of a single set of facts, and was treated as such by both the trial court and the parties below. In the trial of the Title VII claims, the trial court considered the evidence previously adduced in the class action hearing and the *Turner* trial, and refused to allow the repetition of evidence. Counsel for defendants was the same throughout the trial of these matters, and the same witnesses appeared in both cases. To argue that the *Turner* case had different facts should be an embarrassment to respondents, for it shows an absence of knowledge of the record.

It is submitted that the cross-petition for a writ of certiorari should be granted.

Respectfully submitted,

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